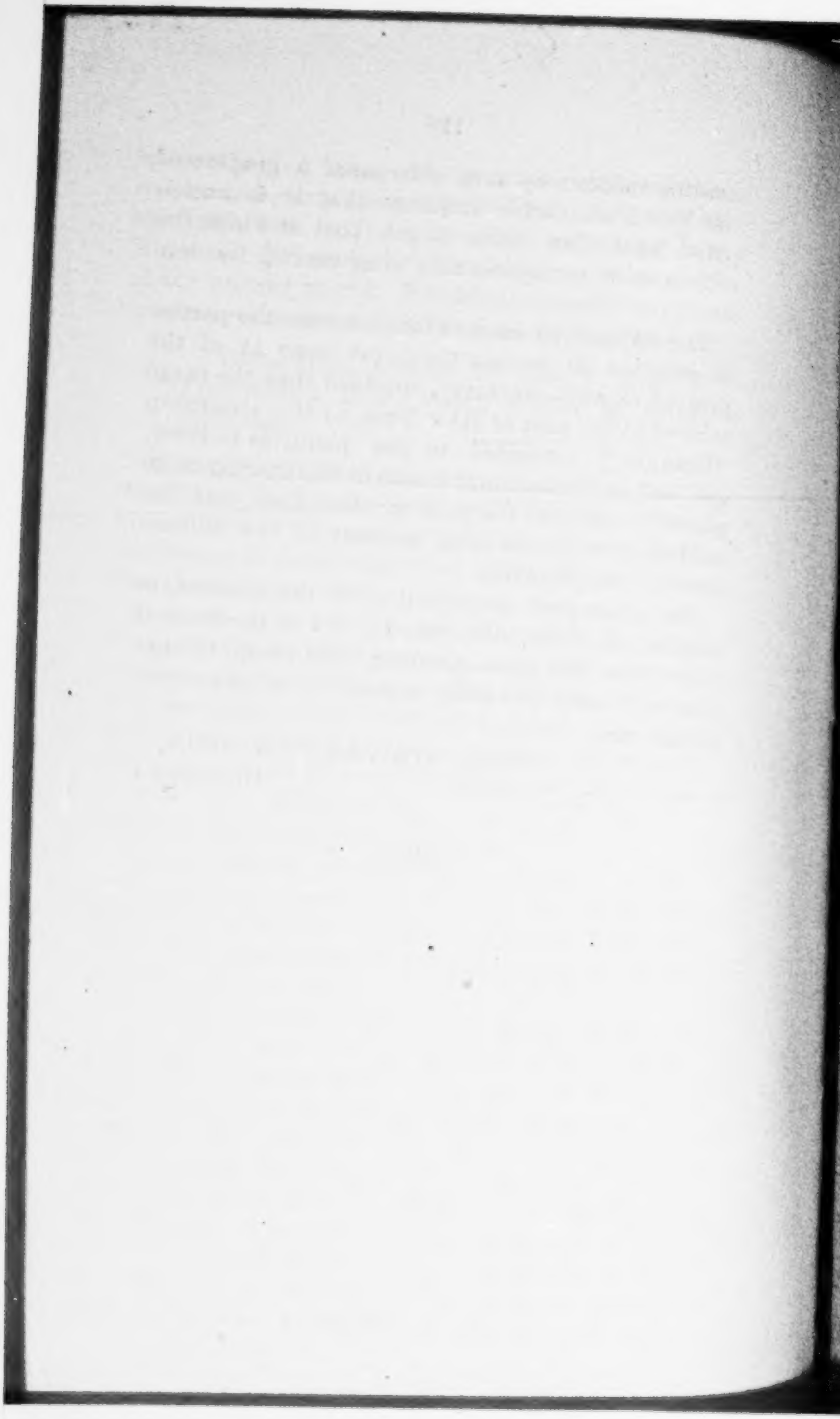

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JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 117.

GEORGE W. CROSSMAN AND ANOTHER,
Plaintiffs-in-Error,

against

THEODOR G. LURMAN AND ANOTHER,
Defendants-in-Error.

ARGUMENT FOR DEFENDANTS-IN-ERROR.

CHARLES STEWART DAVISON,
Of Counsel.

No. 18,648.

APPEAL PRINTING CO., 24 Vesey St. TEL. 192 CORTLANDT.

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Argument for Defendants-in-Error.

If the Court please there is one preliminary matter in relation to this case as it has been presented to this Court by the learned counsel for the plaintiffs-in-error which I desire to refer to briefly before passing on to what I estimate to be the points of law involved therein, and that is, that now for the first time, after three trials before juries in the Supreme Court of the State of New York, three appeals to the Appellate Division of that Court and one appeal to the Court of Appeals of that State, now for the first time is any suggestion made that a diversity of citizenship existed between the sellers and the buyers, and the suggestion or inference is attempted to be made or drawn that in some wise or in some aspect this case bears upon or relates to goods in transit or to commerce between

the States or to commerce between a foreign country and some State other than New York.

The cause has no such aspect; was never tried on any such basis. No suggestion of the possibility of such an aspect being applicable to the case was ever made, nor do the facts in any wise tend to support any such assumption.

The learned counsel for the plaintiffs-in-error calls attention to the fact that the defendants-in-error resided and carried on business in the State of Maryland, at page 2, sub-paragraph 2 of his brief. At page 11, paragraph 6, sub-paragraph 1, he states that his first proposition is that it has been in this case sought to affect by the New York statute a contract between citizens of different States.

On page 12 of his brief, paragraph 2, it is suggested that the coffees in question were imported for the purpose of being resold in the South and Southwestern States.

In paragraph 3 on the same page he suggests that the plaintiffs-in-error were not allowed to show that there was an established trade in adulterated coffees in other of the United States than the State of New York, and that the statute therefore should not have been made to apply to deliveries to non-residents of the State of New York.

On page 14 of his brief, paragraph 4, the learned counsel suggests that the place where the contract was PRESUMABLY accepted was the State of Maryland.

In paragraph 5 on the same page the suggestion is again made that the goods were for delivery to residents of an entirely different jurisdiction; and a great part of the learned counsel's brief is devoted to showing that a distinction is to be made in this case because of that suggested state of facts.

It will be noted, for example, that on page 19 of his brief, sub-paragraph 3, it is again stated that

the contract was PRESUMABLY accepted by the defendants in Maryland; and so an attempt to give an extraterritorial aspect to the case so far as the State of New York is concerned is made with a view to showing that the State of New York could not concern itself with the adulterated condition of these coffees for the reason that the State of New York cannot be presumed to have the power to pass any inspection law except where its operation would tend to protect the health, safety or rights of its own citizens.

It would seem, however, that if the State of New York can wholly exclude from the State under its inspection laws adulterated food products, that it can also prevent as well a sale of such adulterated food within the State after it may have found surreptitious admission as also prevent the enforcement of such a sale in its courts.

But, as I have already said, all this is not only an after-thought on the part of the plaintiffs-in-error, but it is not sustained by the facts. Had such an issue been urged at any previous time, the evidence could and would have been clear and explicit in the record to the contrary. It is only the absence of the suggestion from the case that has now given opportunity to advance the claim. As it is, however, sufficient does appear in the record to show the error of the suggestion that the case bears any such aspect.

If your Honors will refer to the printed record at page 4, where the plaintiff's complaint appears, you will note that it is alleged in the second paragraph that the contract was an agreement on behalf of the plaintiffs "to sell and deliver to the defendants certain coffee to be shipped at Rio de Janeiro *for New York* by the Steamship Catania." It is alleged in the complaint that the coffee was to grade in accordance with the standard of the Coffee Exchange *of the City of New York*, and its price was

to be based on such grading. It is also alleged in the complaint *"that pursuant to the said contract the said coffee was to be delivered to the said defendants* IN STORE AT THE PORT OF NEW YORK." That the terms of payment for the coffee were that the bill was *"to date when coffee is all in store."*

It is also alleged in the complaint (on page 5 of the printed record) that the coffee was to be graded by Messrs. Mackey & Small, who are a firm of *New York coffee* graders, and if the grading was unsatisfactory a licensed grader of the Coffee Exchange of the *City of New York* was to pass upon the matter.

It is then alleged in paragraph 3 of the complaint that the coffee did arrive *at the port of New York* upon the steamship. That it was duly placed in store at the port of New York *"and was thereupon tendered and offered to said defendants."*

It is then alleged that it was graded by these New York graders or coffee brokers. That afterwards the grading being unsatisfactory a licensed grader of the New York Coffee Exchange graded the coffee.

And finally in paragraph 6 of the complaint (page 6 of the printed record) it is alleged that thereafter *"the said coffee was duly sold at public auction in the City of New York by the plaintiffs for and on account of the defendants."*

The defendants-in-error, therefore, respectfully urge upon the Court's attention that with such allegations in the complaint, and with the additional fact, as is well known to the plaintiffs-in-error, that the defendants-in-error, while they resided in the City of Baltimore and conducted business there, also conducted a large part of their coffee business in the City of New York, and this for the good reason that the City of New York is the great coffee

mart of the United States, it is, as I have said, respectfully urged upon the Court that it is too late now by suggestion to try to give the cause an aspect which it does not in fact bear. There was no idea on the part of any party to this contract, nor any suggestion, that the coffee was sold for any special purpose or for any transportation to the south or southwest. No such intent in fact, though intent is wholly immaterial, actuated the defendants-in-error in buying. The contract was a New York contract, made in New York, to be executed in New York and the goods were in no wise in transit. They reached their destination, the port of New York; went into store at the port of New York; delivery was tendered of the goods in store at the port of New York; and the sole fact on which this, as one might say, figment of the imagination is based, is the fact that the defendants-in-error lived in Baltimore.

The claim on the part of the plaintiffs-in-error that the coffees were imported for the purpose of being resold (presumably by the defendants-in-error) in the Southern and Southwestern States, and that they would have shown this by the excluded evidence is, it is submitted immaterial. The attempt in this case is to enforce a delivery attempted to be made in the State of New York. Moreover, the excluded evidence was not in fact offered with any such idea on the part of the plaintiffs-in-error. Nor was any such possible bearing of the evidence called to the Court's attention.

When the offers of parts of the testimony taken on previous trials were made by counsel for the plaintiffs (see foot of page 81 of the Printed Record) the counsel was asked from abundant caution whether he claimed that it had reference to any different question from that which had been presented to the Court; to which he replied that he offered the

testimony as bearing upon the issues in the case, making no suggestion of the taking of any such position as is now suggested. Had any such position been taken it could have been then and there refuted to the fullest extent; but it was not made nor was it within the issues of the case as presented by the pleadings as framed by the plaintiffs' own verified complaint and the answer.

Moreover, it will be noted that no such ground was taken in the counsel's motion to direct a verdict for the plaintiffs. The third ground (Printed Record, foot of page 83) is the only ground which has to do with the statute, and there is no suggestion therein that the goods were in transit or that it was a contract to be performed elsewhere than the plaintiffs-in-error on oath in their complaint had alleged that it was to be performed, that is in the City of New York.

There is one other matter, though of but a trifling nature, to which I desire to call attention at the outset. There is a suggestion in the plaintiff's brief that the falling of the coffee market was what led to the defendants' rejection of the adulterated coffee; but the Court will note that there is something more in this case than that.

The action is brought to recover a trifling sum, $1,300, (the damages which the plaintiffs claim they suffered), and yet each side has expended upon its prosecution and defense respectively several times the total amount involved. And it would surely be extraordinary if a reputable business house, and I think the plaintiffs-in-error have never claimed that the defendants-in-error were not such, were willing to be suspended from the Coffee Exchange of the State of New York for a year, as they were, as appears in the Record, for their refusal to accept adulterated goods, be re-instated by the Courts on the ground that such suspension was un-

lawful and go to the expense and annoyance of nine years of constant litigation for the mere purpose of avoiding a trifling loss on a slightly differing market, although it may be said that there is in the Printed Record no evidence sufficient to sustain the proposition that there was a falling market or that the defendants-in-error must necessarily suffer *a loss on this coffee, assuming it not to have* been adulterated, had they accepted it.

I shall, therefore, venture to assume that this was a New York contract for the delivery in New York of certain coffee in a raw and natural state, and in that connection I venture to ask the Court's attention to a phrase in the contract (page 14, foot of page). which, omitting the immaterial, reads:

> "sold five hundred bags Rio coffee (sound and made sound portion) to be shipped at Rio de Janerio by steamer Catania."

Your Honors will note that the contract provides that the coffee shall be sound, and that if it be found not to be sound, that it shall be made so; and it is to be noted that it appears by the exhibits in the case that the defendants in error attempted to avail themselves of this stipulation in the contract for their protection (see page 98 of Printed Record, Plaintiff's Ex. JJ.).

In that letter from the defendants to the plaintiffs they call attention to the fact that while they must decline to accept the coffee tendered as No. 9 coffee, they await *the plaintiffs substitution of other lots;* of coffee therefore, and in plaintiffs' Exhibit KK, a further letter from the defendants to the plaintiffs, they call attention on the 15th of August, the same day, to the fact that the coffee tendered for 9s is colored and damaged and add:

"Please substitute other coffee."

saying

"We bought the coffee in good faith and we feel quite sure that you will correct the mistake."

We have then a contract to deliver at the Port of New York, five hundred bags of sound, raw Rio coffee. We have a tender of that coffee in store at the Port of New York, a refusal to accept it so far as it was adulterated, on the ground of its adulteration. We have a sale of that coffee in the City of New York, at auction to establish the measure of damages. We have an action brought in the State of New York for the purpose of recovering the difference between the amount realized at auction and the amount called for by the contract, and a defense that the goods were adulterated and obnoxious to the Statute of the State. We have the cause sent to the jury on the single issue of the adulteration or non-adulteration of the coffee. That is, the Trial Judge charged the jury (see page 87 of the Printed Record, toward the end of the page).

> "Perhaps the Court should say to you that it is not the mere coloring of coffee which infringes upon the Statute and *that you must remember*, but it is the coloring of the coffee which produces the effects as facts specified in the Statute, that is, concealing damage, enhancing value, etc."

The Court having previously (page 85 near the end of folio 120) charging the jury as to the issue in the case, said:

> "It is a very simple one. Was the merchandise so colored etc., as to conceal damage or make it appear better than it really was or of greater value?"

And at the request of the plaintiffs (page 91 of the Printed Record) the Court charged the jury that the only question which the jury had to consider was whether the coffee was adulterated with-

in the meaning of the public health law of New York.

And he also charged the jury (page 91, folio 131):

> "that the mere fact that an artificial coloring matter was placed on the coffee does not constitute adulteration and that the jury were not to consider any intent or purpose with which any coloring matter was placed upon the coffee."

That is by their verdict the jury found that the coffee had in fact been colored, coated and powdered over so that damage was concealed: that is, its damaged condition was no longer apparent to the eye, and it was thereby made to appear better than it was, or of greater value.

Now, if the Court please, as to what this coloring matter which was placed upon the coffee was, there can be no question. The defendants called and examined the plaintiffs' own expert chemist who had testified on behalf of the plaintiffs on previous trials (page 22 of Printed Record). He said that he found on the coffee

> "some form of iron: that is, a chemical substance in certain quantities opaque. It was a dense substance of a reddish color."

He said (at the foot of page 23):

"That it was presumably oxide of iron."

The defendants also examined another chemist, Mr. Lehman (page 40 of the Printed Record). He said that he also had analyzed some of the coffee, and that he found it covered with a dense opaque coloring like yellow ochre; that it was a basic ferric salt containing all the elements of yellow ochre. He showed a bottle of yellow ochre and said that that corresponded to the substance he got off the coffee beans; that he had anayzed some of the con-

tents of the bottle and that it contained the same substance as that removed from the coffee beans.

He says (page 41 of Printed Record), that he analyzed some natural coffee not discolored by any yellow substance and that he did not find any yellow ochre in the analysis of the natural coffee. He says (at foot of page 42) that he would call it an oxide of iron, or that a basic ferric salt was the more accurate name. He also says that the substance was opaque and the general testimony in the case shows that the coffee was covered up with this yellow substance, so that the damage in the coffee was not discernible: and the jury so found.

Substantially, these then are the material facts, and the case, it is respectfully submitted, reduces itself to an inquiry before this Court as to the constitutionality of the Statute of the State of New York.

The State statute is Chapter 25 of the General Laws of the State of New York; the Public Health Law of that State. It is a lengthy statute and was passed as Chapter 661 of the Laws of 1893 and contains some two hundred and ten sections covering the entire ground of State and local Boards of Health, of adulterations, of tuberculosis and glanders, of potable waters, quarantine and health officers, practice of medicine and dentistry, of pharmacy and contains various other provisions.

Article III of that statute deals with adulterations and consists of ten sections. So far as is material here the statute reads (excluding all immaterial matter) as follows:

> "The term food when used herein includes every article of food and every beverage used by man.
>
> No person shall within the State have, sell or offer for sale any adulterated food. An

article shall be deemed to be adulterated within the meaning of this Act in the case of food if it be colored or coated or powdered whereby damage is concealed."

The statute covers the case of the admixture of any ingredient which may render such article injurious to the health of the person consuming it; and the case of the mixing with the food of any substance so as to injuriously affect its quality.

I think it will be on all hands conceded that this general law of the State of New York is not in any wise or aspect an act passed in bad faith with the intent or for the purpose of indirectly effecting some other result than that which is apparent upon its face.

The many attacks which have been made before this Court on State statutes which have attempted to interfere with commerce with foreign nations or between the States under the guise of being an exercise of the police power of the particular State find no parallel here. Indeed, no such suggestion is made. Assuming this to be so, that the statute contemplates only proper objects then under the decisions of this Court this statute would stand as a valid exercise of the police power of the State in the nature perhaps of an inspection law, and permitting the State authorities under it at any time to lawfully exclude from the State or confiscate any article of food obnoxious to its provisions.

This has been so often and so clearly held by this Court and the line of distinction between what are the police powers of a State and what are matters which fall within the regulation of commerce with foreign countries and between the States has been so often considered and so clearly announced by this Court that I feel that it would be to in-

fringe upon the Court's time to go into any discussion in detail of that matter.

On the brief, the attention of the Court has been directed to the cases of

Bowman vs. The Chicago & Northwestern R. R. Co.

Schollenberger vs. Pennsylvania, and *Plumley vs. Massachusetts.*

And to those cases which are analyzed and commented upon in the opinions therein.

The attention of the Court has also been respectfully requested for the opinion in this case itself at the Court of Appeals by Mr. Justice Haight, which will be found in the printed record at pages 163 and 167, and also will be found reported in 171 N. Y., at page 329.

We estimate the distinction to be that where an article is an article of commerce the State cannot exclude it by what device soever. That where an article, however, is by inherent character or has become by reason of damage, using the phrase in its largest sense or by reason of noxious adulteration, no longer an article of commerce, the State can rigorously protect itself against it in accordance with its own best judgment.

If and unless then one is prepared to say that the coating of coffee with a noxious chemical, in this case a basic ferric salt known as oxide of iron and popularly termed yellow ochre, with the resultant effect of concealing damage which actually exists in the coffee, is not to so change the character of natural coffees as to make it reasonable that it should be deemed adulterated and obnoxious—unless one is prepared to say that a provision excluding such a substance is wholly unreasonable and a mere device to hamper and restrain commerce we submit that the pro-

visions of a statute providing for the exclusion of an article of such changed character will be found by this Court to fall within the proper scope and purview of such a statute as is here in question.

One further suggestion is made by the plaintiffs-in-error, that is that because Congress at that time had itself enacted a law aimed at just such adulterated foods as these coffees, therefore this statute became unconstitutional.

It seems sufficient to say that in relation to the police powers of the State, in relation to their inspection laws (their public health laws to put it generally), the rights reserved do not fall within that class of matters as to which when Congress legislates, the State's right ceases.

But even if it did, in view of the fact that the Act of Congress known as Chapter 839 of the Laws of 1890, itself condemns just such adulterated foods as are concerned in this case, it would be but an absurd result to say that the cause should be reversed because the State Court applied the State statute when it would have been sustained had the State Court availed itself of the Act of Congress.

It may be argued that the Act of Congress provided for the confiscation of articles which are in fact obnoxious to its terms and for no other penalty or result. But it seems clearly to follow that if the State statute merely helps out the Act of Congress and provides that that shall not be dealt in which Congress says shall be confiscated, the State statute is neither repugnant to the terms of the Act of Congress nor unconstitutional.

The plaintiffs-in-error seem to think that there is some substantial or legal difference between the phrase an adulterated or unwholesome food; adulterated or mixed in with any poisonous or noxious chemical drug or other ingredient injurious to

health; and the facts of this case, that is raw coffee so covered with a coating with yellow ochre, which is a noxious chemical, as that its damaged condition is concealed.

But how was this coffee coated with this yellow ochre except by the yellow ochre being physically mixed in with it, and why is not yellow ochre a noxious chemical within the meaning of the Act of Congress? The Act of Congress carefully specifies both "poisonous" and "noxious" chemicals. Recognizing that there are chemicals which are not such active poisons as to fully fall within the scope of the term "poisonous," it adds the term "noxious." That is, unwholesome, injurious, insalubrious, as the dictionaries define it. The word is the equivalent or a synonym for "noisome," which is defined as noxious to health, hurtful, mischievous; unwholesome, offensive to the smell or other senses; and as the Court of Appeals says in its opinion, there is no claim here that the addition of this yellow ochre improved the taste or added to the value of the coffee; and as to make such a claim would in itself be ridiculous, and whereas it is moreover matter of common knowledge that yellow ochre is not a deadly poison, but is distinctly unwholesome, it would seem as though so far at least as this case is concerned, there was no repugnance, but a close correspondence between the State statute and the then existing statute of the United States against adulterations.

That this matter of adulterating food has grown to proportions which have called for more careful attention than the former statute of the United States was a dead letter and not enforced, that just such provisions as those of the statute of the State of New York are desirable and requisite for the protection of the entire United States, is so far to-day matter of common knowledge that I need but

remind the Court of the recent legislation and of the activity of the United States to-day in excluding from our borders the adulterated wines and foods of all description which are attempted to be foisted on the people of the United States by unscrupulous foreign dealers.

CHAS. STEWART DAVISON,
Of Counsel.